December 2006

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.33 Scientific Expert Testimony

L. Court Appointed Expert

Insert the following case summary after the second paragraph in this subsection on page 91:

To obtain the appointment of an expert witness, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Carnicom*, ___ Mich App ___, ___ (2006). Moreover, it is not enough that the defendant shows a mere possibility of assistance from the requested expert. Without some showing by the defendant that the expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Id*.

In *Carnicom, supra*, the defendant requested that the court authorize funds to conduct an independent test of the defendant's blood sample. The defendant asserted that this witness would be able to offer testimony to explain away the presence of an illegal substance in defendant's bloodstream at the time of his arrest. However, the defendant made no showing that the expert testimony would likely benefit him. The trial court, on this basis, denied defendant's request for funds for the expert witness. On appeal, the Court of Appeals held that absent some showing by the defendant that the expert testimony would likely benefit the defense, a trial court does not abuse its discretion. In light of the defendant's failure to demonstrate that the requested expert's testimony

would likely benefit him, the Court found that the trial court had not abused its discretion when it denied defendant's request for funds.

CHAPTER 2

Evidence

Part IV—Hearsay (MRE 804 Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

In *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006), the Michigan Court of Appeals, on remand from the Michigan Supreme Court, reversed its prior holding in *People v Walker (Walker I)*, 265 Mich App 530 (2005).

Accordingly, delete the April 2005 update to page 112 concerning *Walker I* and insert the following case summary after the July 2006 update to page 112:

Statements made by the neighbor of a victim during a 911 call, which statements were made for the purpose of obtaining assistance for the victim, do not constitute "testimonial statements" for purposes of the Confrontation Clause. *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006). The neighbor's written statement regarding the information the victim provided to her, however, as well as the victim's written statement, do constitute "testimonial statements" for purposes of the Confrontation Clause when there is no indication that a continuing danger to the victim existed at the time these written statements were made.

In *Walker*, the defendant beat the victim and threatened to kill her. *Walker II*, *supra* at ___. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim also made a written statement to the police. The victim did not appear for trial, and all of these statements were admitted under the excited utterance exception to the hearsay rule. On appeal, the defendant argued that pursuant to *Crawford v Washington*, 541 US 36 (2005), admission of these statements violated the Confrontation Clause because they were "testimonial statements." The Court of Appeals, however, rejected the defendant's argument. *Walker I, supra* at 533. Subsequently, however, the Michigan Supreme Court vacated the holding of the Court of Appeals in *Walker I* as to the Confrontation Clause issue and remanded the case to the Court of Appeals for reconsideration in light of the newly decided case of *Davis v Washington*, 547 US ___, ___ (2006). *People v Walker*, 477 Mich 856, 856 (2006). On remand, the Court of Appeals found that the statements made during the 911 call were not testimonial in nature because they were made for the purpose of resolving an existing emergency. *Walker II*, *supra* at ___. However, the Court found that the neighbor's written statement to the

police and the victim's own statement to the police both did constitute "testimonial statements" for purposes of the Confrontation Clause. The Court reasoned that there was no indication of continuing danger at the time these statements were made:

> "[T]he victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed.[Citation omitted.] Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime . . . ". *Walker II, supra* at ___.

On this basis the Court of Appeals reversed its prior holding in *Walker I*, and remanded the case to the trial court for further proceedings as appropriate. *Walker II, supra* at ___.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the January 2006 update to page 415:

In light of *Davis v Washington*, 547 US ___ (2006), and *Crawford v Washington*, 541 US 36 (2005), the Court of Appeals reversed an earlier ruling* and concluded that a crime victim's statements to a neighbor and a police officer were improperly admitted because they constituted "testimonial statements" for purposes of the Confrontation Clause, and the defendant had not had an opportunity to cross-examine the victim. *People v Walker (Walker II)*, ___ Mich App ___, ___ (2006). In *Walker*, the defendant beat the victim and threatened to kill her. The victim jumped from a second-story balcony and ran to a neighbor's house, and the neighbor called the police. The victim made statements to the neighbor, who wrote out the statements and gave them to the police. The victim did not appear for trial, and her statements were admitted under the excited utterance exception to the hearsay rule.

**People v Walker*, 265 Mich App 530 (2005).

Because the circumstances in *Walker* were substantially similar to the circumstances in *Davis, supra,* and the companion case to *Davis*, *Hammon v Indiana,* the Court concluded that a similar outcome was warranted. As did the United States Supreme Court in *Davis*, the *WalkerII* Court determined that the content of the 911 call was nontestimonial evidence properly admitted at trial because the operator's questioning "was directed at eliciting further information to resolve the present emergency and to ensure that the victim, the neighbor, and others potentially at risk . . . would be protected from harm while police assistance was secured." *WalkerII, supra* at ___.

The *Walker II* Court further concluded that "[u]nlike the 911 call, the victim's written statement recorded by her neighbor, and her statements to the police at the scene, [we]re more akin to the statements in *Hammon*, which the *Davis* Court found inadmissible under the Confrontation Clause." *Walker II, supra*, at ___. The Court explained:

> "As in *Hammon*, where the police questioned the domestic assault victim separately from her husband and obtained her signed affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no

> indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. *Davis, supra* at 2278. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' *Davis, supra* at 2278. Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker, supra* at ___.

The Court determined that the error in admitting the testimonial statements was not harmless and remanded the case for further proceedings.

CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.49 Jury Deliberation

C. Hung Jury

Insert the following text after the January 2006 update to page 436:

When a trial court's supplemental instruction to a deadlocked jury represents a substantial departure from ABA standard jury instruction 5.4* and the result of the instruction is coercive, reversal is required. *People v Rouse*, ___ Mich App ___, ___ (2006). In *Rouse*, the trial court prefaced its nearly verbatim delivery of CJI2d 3.12—Michigan's standard deadlocked jury instruction—with a supplemental instruction that substantially departed from ABA jury instruction 5.4. In part, the trial court's supplemental instruction stated:

> "But in considering everything that I will read to you, also consider that if you are not truly able to reach an agreement on this in compliance with the instruction that I will give you, it will result in everybody coming back, the victim and the defendant included, and going through this entire process again with another jury. That is a difficult situation. It is, it is, you know, in terms of the justice that we are rendering in this case, I think is somewhat compromised if we are unable to reach a verdict one way or the other in this case." *Rouse, supra* at ___.

Considering the trial court's supplemental instruction "in the factual context in which it was given," the Court of Appeals determined that the instruction was coercive for several reasons. The *Rouse* Court noted that the trial court's suggestion that justice would be compromised and "everybody" would have to return and repeat the entire process "contained the message that a failure to reach a verdict constitute[d] a failure of purpose and tended to pressure the jury to reach a unanimous verdict as part of its civic duty." *Rouse, supra* at ___. The Court further noted that the trial court's instruction "included language indicating that if the jury did not reach a verdict, the victim would be subjected to another trial . . . language that, in effect, pressured the jury to make a decision based on emotion or sympathy for the minor victim."

*The supplemental instruction adopted by the Michigan Supreme Court in *People v Sullivan*, 392 Mich 324, 341–342 (1974).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

D. Imposition of Sentence

9. Restitution

Insert the following text after the second paragraph in this sub-subsection on page 453:

The amount of restitution ordered may include the cost of labor necessary to determine the value of property lost as a result of a defendant's criminal conduct, as well as the labor costs involved in replacing the lost property. *People v Gubachy*, ___ Mich App ___, ___ (2006).